IN THE

Supreme Court of the United States

October Term, 1944

Nos. 37 and 45

TOM TUNSTALL, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BESTER WILLIAM STEELE, *Petitioner*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*.

THURGOOD MARSHALL,
WILLIAM H. HASTIE,
Counsel for National Association for the Advancement of Colored People.

INDEX

Table of Cases.

Statutes.

Miscellaneous.

IN THE

Supreme Court of the United States

October Term, 1944

Nos. 37 and 45

TOM TUNSTALL, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ESTER WILLIAM STEELE, *Petitioner*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for and on behalf of the National Association for the Advancement of Colored People, respectfully move this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*.

The National Association for the Advancement of Colored People is a membership organization which for thirty-five years has dedicated itself to and worked for the achievement of functioning democracy and equal justice under the Constitution and laws of the United States.

From time to time some justiciable issue is presented to this Court, upon the decision of which depends the course for a long time of evolving institutions in some vital area of our national life. Such an issue is before the Court now. As will more fully appear in the accompanying brief, this Court is here asked to decide whether a labor organization which excludes Negroes from membership may lawfully obtain from national legislation power of governmental character over the employment of all persons in a defined area of industry and commerce and thereafter utilize that power to exclude Negroes because of their race from participation in the processes of collective bargaining and access to employment within the area in question.

The question is essentially whether our Constitution and laws permit the processes of government so to be perverted as to deprive the Negro of the right to earn a livelihood.

It is to present written argument on this issue, fundamental to life itself, that movants seek leave to file a brief *amicus curiae*.

Counsel for the petitioners has consented to the filing of this brief. Counsel for the respondents have been requested to consent, but have refused.

THURGOOD MARSHALL,
WILLIAM H. HASTIE,
Counsel for National Association for the Advancement of Colored People.

IN THE

Supreme Court of the United States

October Term, 1944

No. 37

TOM TUNSTALL, *Petitioner*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 45

BESTER WILLIAM STEELE, *Petitioner*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*.

This Brief is presented by the National Association for the Advancement of Colored People as *amicus curiae* be-

cause of the importance of the issues involved to the protection of basic rights of Negro employees under the provisions of the Railway Labor Act and similar provisions of the National Labor Relations Act.

Opinions Below

Statutes Involved

The opinions below and the statutes involved are both set out in full in the brief of the United States as *amicus curiae* heretofore filed.

Questions Presented

1. **Can a labor organization which refuses, on account of race, to admit employees within a craft or class to membership in the organization be the representative of that craft or class within the meaning of Section 2, Fourth, of the Railway Labor Act**

2. **Is a collective bargaining agreement which by its terms requires a carrier to discriminate against employees within the craft or class because of race in apportioning work illegal under the Railway Labor Act?**

Statement

The petitioner in each of these cases is a Negro fireman on a railroad in the southeastern portion of the United States. The respondents in each case are (a) the road on which each has been employed for many years, (b) the Brotherhood of Locomotive Firemen and Enginemen, a labor organization composed of white firemen on the nation's railroads which refuses to admit Negro firemen to membership or to represent their interests in dealing with

railroad managements, and (c) certain subordinate lodges and individual officers of the Brotherhood which have put the Brotherhood's discriminatory policies into effect on the respondent railroad to the detriment of the petitioner in each case (No. 37, R. 6; No. 45, R. 83). Petitioners sue in their own behalf and as representatives of all Negro firemen on the respondent railroads (No. 37, R. 5; No. 45, R. 84). They seek relief, one in the Federal courts and one in the courts of the State of Alabama, against discriminatory and oppressive practices on the part of the railroads and the Brotherhood which have deprived them of jobs which they would have held but for their race. The events involved in the instant cases are the culmination of a sustained effort on the part of respondents, continued over several decades, to eliminate Negro firemen from the Southern roads. In order to present the facts of this case in their proper perspective, we shall here outline briefly the history of the employment of Negro firemen on the railroads of the South.[1]

The employment of Negroes as firemen on the Southern railroads is a practice which for decades has had complete and unquestioned acceptance by the public.[2] Until the ad-

[1] Authorities referred to in the following paragraphs include the following: Summary, Findings and Directives issued on November 18, 1943, by the President's Committee on Fair Employment Practice relating to Parties to the "Southeastern Carriers Conference" or "Washington" Agreement (mimeograph); printed in full in appendix to Petitioner's Brief, No. 37 (pp. 58-67); Herbert R. Northrup, "Organized Labor and the Negro," Harper and Bros., 1944, pp. 50-101; Sterling D. Spero and Abram L. Harris, "The Black Worker," Columbia Univ. Press, 1931, pp. 284-315; Horace R. Cayton and George S. Mitchell, "Black Workers and the New Unions," Univ. of North Carolina Press, 1939, pp. 439-445.

See also Article, Lawyers Guild Review, I. J. A. Bulletin Section, Vol. IV, No. 2, March-April 1944, "The Elimination of Negro Firemen on American Railways—A Study of the Evidence Adduced at the Hearing Before the President's Committee on Fair Employment Practice," pp. 32-37.

[2] Spero and Harris, p. 284.

vent of mechanical stokers and Diesel engines in recent years, the fireman's job on an engine was grimy and arduous.[3] In the first few decades of the century it was held in the South almost exclusively by Negroes, not only because of the nature of the work, but also because of the fact that the carriers were able to pay them lower wages than white firemen.[4] This important incentive was removed during the first World War when the Federal Government, then operating the roads, adopted and applied the principle of equal pay for equal work.[5] With the resumption of private operation after the war, the proportion of Negroes on the Southern firing forces began a decline which has continued ever since.[6] The result has been that the proportion of Negro firemen on many roads has been reduced from a majority to a small minority.[7] But the Negroes who remain have greater seniority than most of the white firemen who constitute the majority.[8]

The Brotherhood of Locomotive Firemen and Enginemen admits no Negroes to membership (No. 37, R. 6; No. 45, R. 83). Since early in this century it has endeavored to force Negroes out of the firing forces of the Southern roads and to replace them with its own white members.[9] It has entered into contracts with carriers limiting the proportion of Negroes who may be employed as firemen in each class of service, in each seniority district on the contracting roads. These contracts are enforced without regard to

[3] Cayton and Mitchell, p. 441; Northrup, p. 62.
[4] Spero and Harris, pp. 289-290; Northrup, p. 49.
[5] Spero and Harris, pp. 294-295; Northrup, pp. 50-51.
[6] Northrup, pp. 52-54.
[7] Northrup, pp. 52-54; Spero and Harris, p. 284.
[8] Northrup, p. 54; Spero and Harris, pp. 441-442.
[9] Spero and Harris, pp. 287-289, 307; Northrup, pp. 50, 65. According to Spero and Harris (p. 307): "In 1926 President Robertson of the Brotherhood of Locomotive Firemen told his convention that he hoped to be able to tell the next meeting that not a single Negro remained on the left side of an engine cab."

seniority so that senior Negroes are replaced by junior white firemen and deprived of positions which they would hold but for their race.[10]

In 1940, the Brotherhood moved for a sudden extreme acceleration in the gradual elimination of Negro firemen which the ban on hiring of Negroes and the contracts described above had already made inevitable.[11] It asked a number of Southern roads to enter into a contract which would have given all new positions, as fast as they were created by schedule changes or otherwise, to white firemen.[12] When the railroads rejected this proposal, the disagreement came before the National Mediation Board under the terms of the Railway Labor Act. The dispute was finally terminated by the execution, on February 28, 1941, of a single agreement between the Brotherhood and 21 Southern roads, including respondents herein, which is known as the Southeastern Carriers Conference Agreement (No. 37, R. 8-9; No. 45, R. 89-90, 10-13).[13]

Briefly, this agreement provides [14] (a) that the percentage of Negro firemen in each seniority district, in each class of service, shall not exceed 50 per cent; (b) that where the percentage is in excess of 50 per cent the quota is to be reached by assigning new runs to white firemen; and (c) that all pre-existing contracts containing more restrictive clauses [15] remain in effect and that further restrictions may

---

[10] Spero and Harris, pp. 291-292, 306, 307; Northrup, pp. 52-54.
[11] Northrup, p. 63; Guild Review, p. 33.
[12] Northrup, p. 63.
[13] Northrup, p. 63.
[14] This and more similar contracts refer to Negro firemen as "non-promotable firemen"; that is, firemen who may not be promoted to the position of engineer. However, a supplementary agreement between the Brotherhood and respondent Norfolk Southern expressly provides that "the phrase '—non-promotable firemen—' . . . refers only to colored firemen" (No. 37, R. 7-8; 13-16).
[15] (Ibid.).

be made by separate contracts with individual roads. It was in purported compliance with this contract that petitioners were removed by respondent railroads, at the behest of respondent Brotherhood, from positions which they would have retained had the seniority practices of the railroads been applied regardless of race (No. 37, R. 10-11).

The complaint herein, the allegations of which are necessarily admitted, state that the Brotherhood's conduct of negotiations with the roads is designed "to secure a monopoly of employment and the most favorable jobs for its own members" (No. 37, R. 9-10; No. 45, R. 88-90). The Southeastern Agreement on its face shows the validity of this statement.

Brotherhood representatives are free to designate the better positions arbitrarily as "white men's jobs" and to force the Negroes, regardless of seniority, out of all but the most menial, irregular, and unremunerative work.[16] An example of such exclusion by practice rather than by contract appears in the fact that although only four railroads have agreements oral or written, only two Southern roads allow such use on any but switching engines.[17] In fact, it is no coincidence that the Brotherhood's intensified drive to take over the firemen jobs long held by Negroes is coincident with the recent increased use of Diesel and automatic stoker engines on the roads of this country. The years during which the Negro firemen have done the dirty work on the engines go for naught; they were not allowed to exercise their hard-won seniority to secure the easier berths to which their years of service entitled them.[18]

The net result of the policies of the Brotherhood, condoned and put into effect by the carriers, is that the use of

[16] Northrup, pp. 64-65.
[17] Northrup, pp. 62-64.
[18] Summary, etc. of the President's Committee, p. 5.

Negroes as firemen, long an established practice in the South, is rapidly coming to an end.[19]

In these cases, petitioners, both of whom have suffered through the application of the Southeastern Agreement to cause them to be transferred to poorer jobs, ask on behalf of themselves and all other Negro firemen on the respondent railroads that the courts issue injunctions restraining the railroads and the Brotherhood from enforcing all agreements between them which discriminate against Negro firemen and further restraining the railroads from dealing with the Brotherhood as, and the Brotherhood from acting as, the statutory representative of the Negro firemen so long as the Brotherhood continues to discriminate against them (No. 37, R. 4, 12-13; No. 45, R. 96-97). Petitioners also ask for damages sustained by reason of the discrimination and for a declaratory judgment setting forth their rights (*id.*). Petitioner Tunstall also seeks an order requiring the respondent Norfolk Southern Railroad to restore him to the job from which he was removed by reason of the Southeastern Agreement (No. 37, R. 13).

SUMMARY OF ARGUMENT

I

A labor organization which refuses because of race to admit to membership employees within a craft or class does not meet the requirements which the Railway Labor Act imposes as a condition precedent to any organizations qualifying to act as the exclusive statutory representative of such craft or class for purposes of collective bargaining. In providing that the representative chosen by the majority of the employees in a craft or class should be the exclusive representative of all employees in the craft or class for the purposes of the Act, Congress intended that only an organ-

[19] Summary, etc., of the President's Committee, pp. 64, 65.

ization which was organized to practice genuine collective bargaining could serve as such a representative. It is a basic conception of labor relations and of the trade union movement that collective bargaining is a system whereby all employees, whose jobs bring them into competition with one another, participate by a democratic representative system of self-government in the determination of their conditions of employment. An organization which refuses to admit to membership all employees within the craft or class who are willing to abide by its reasonable rules or regulations is not practicing collective bargaining.

If the Railway Labor Act is construed to permit a labor organization, which refuses to admit employees because of race within the craft or class to membership, to be their exclusive representative, that act is unconstitutional. The powers which that Act vests in the statutory representative to fix the wages, hours and terms of employment of all employees within the craft or class irrespective of their consent or authorization, are governmental in character. It would be a denial of due process and equal protection to vest such powers over a Negro minority in a hostile white majority. It is not a denial of due process or equal protection to vest such powers in an organization in whose affairs all employees in the craft or class, white and colored alike, participate equally through membership, with the accompanying rights to attend and be heard at its meetings, to vote for its officers and its grievance and bargaining committees and to help shape the terms of its collective bargaining proposals.

II

A collective bargaining agreement which by its terms requires a carrier to discriminate against colored employees

and in favor of white employees within the craft or class, in apportioning work, is illegal. Where a carrier enters into such an agreement with a labor organization not qualified to act as the representative of the craft or class, the carrier thereby violates the Railway Labor Act. But even if the labor organization with which the carrier makes such an agreement is entitled to act as the exclusive statutory representative of the craft or class the agreement still violates the Railway Labor Act where all the white employees are members of that labor organization and none of the colored are members, for that Act requires the carrier and the representative to treat all employees within the craft or class equally, without discrimination in favor of those who are members of the contracting labor organization and against those who are not members.

Unless the Railway Labor Act is construed to prevent a carrier and a labor organization from entering into a collective agreement which discriminates in employment opportunities against Negro employees within the craft or class it is unconstitutional. The statutory grant of the powers of majority rule to a labor organization must be subject to the limitations of the Fifth Amendment. For the powers exercised by the labor organization in fixing terms of employment binding on a non-consenting minority, being governmental in character, cannot be exercised by the organization to which they have been delegated free of the constitutional restraints upon their exercise which would have bound Congress if it had exercised these powers directly instead of delegating them.

Furthermore, even if the collective labor agreement be treated as a mere contract between private parties, lacking any of the characteristics of governmental action, it is still invalid. The constitutional policy against race discrimination bars court enforcement of any contract requiring its

parties to practice such discrimination. Since no court could constitutionally enforce the contract this Court should declare its invalidity and enjoin the parties thereto from carrying out such discrimination.

ARGUMENT

Introduction

With the constantly increasing power which legislatures and courts are vesting in labor unions there must go an implied limitation that labor unions shall not use their greatly increased powers for purposes of discriminating as to employment opportunities because of race. The Negro worker like every other worker needs the protection of his government in the right to organize and bargain collectively through representatives of his own choosing. We recognize that Negroes who are employed in a craft or class can achieve the benefits of collective bargaining only where all employees within the craft or class bargain through one representative. No one has suffered more severely in the past from strife among workers forced to compete for jobs than the Negro. His wages have continually been driven down by the employer who played one group in the class or craft off against another. These evils have been counteracted in part by the National Mediation Board[20] and the

[20] The position of the National Mediation Board against setting up units on a Jim Crow basis has been summarized in one of its publications as follows:

> "The Board has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives. All those employed in the craft or class regardless of race, creed, or color must be given the opportunity to vote for the representatives of the whole craft or class." National Mediation Board, The Railway Labor Act and the National Mediation Board (Gov't Print. Off., 1940), p. 17.

(Footnote continued on page 13)

National Labor Relations Board[21] in refusing to segregate employees of different races into separate units. The requirement that the union in order to be certified win a majority of the votes of employees, some of whom are colored, has gone far in many industries to induce unions to open

(Footnote continued from page 12)

The cases in which the National Mediation Board has rejected the request of a carrier or a union that Negro employees be segregated into a unit separate from the white employees are: *In the Matter of Representation of Employees of the Atlanta Terminal Co.*, Case No. R-75; *In the Matter of Representation of Employees of the Central of Georgia Railway Co.*, Case No. R-234.

[21] The National Labor Relations Board has encountered the problem in a number of different settings. *In Matter of Crescent Bed Company, Inc.*, 29 N. L. R. B. 34, 36, "The Company [had] refused to grant exclusive recognition to the United because of the existence of a contract between it and the Independent * * * covering all the colored employees of the Company." The Board ruled that, "Since the contract * * * covers only the colored employees of the Company and the Act does not permit the establishment of a bargaining unit based solely on distinctions of color, we find that the contract between the Independent and the Company is no bar to a determination of representatives." In *Matter of Columbian Iron Works*, 52 N. L. R. B. 370, 372, 374, the Board held that a contract with a union which admitted only white employees was not a bar to an election, holding that the contract did not cover an appropriate unit because a unit could not be based on racial considerations. In *Matter of Utah Copper Company*, 35 N. L. R. B. 1295, 1300, the Board dismissed a petition for certification because the unit sought was inappropriate, stating, "the I. A. M. proposes to limit the Machinists unit to white employees, a limitation we have held not permissible." In *Matter of U. S. Bedding Co.*, 52 N. L. R. B. 382, 387-388, the employer and the A. F. L. objected to the establishment of an industrial unit on the ground that Negro employees in the unit outnumbered the white employees. The Board said, "a finding that the industrial unit is inappropriate because the majority of the employees in the unit are colored would be contrary to the spirit of the Executive Order and the established principles of this Board." In *Matter of Brashear Freight Lines, Inc.*, 13 N. L. R. B. 191, 201, the Board dismissed a complaint based on charges of refusal to bargain, it appearing that the union lacked a majority in the unit when the Negro employees whom the union claimed were not properly within the unit were counted in the unit.

The most usual cases are those in which either the employer or one of the unions seeking certification asks to have a small group of

(Footnote continued on page 14)

their doors to Negroes and by fair treatment to make a bid for their vote.[22] There have, of course, been many unions

(Footnote continued from page 13)

colored employees excluded from the unit. The Board's oft repeated denial of such a request is usually phrased, "We have consistently held that, absent a showing of differentiation in functions which would warrant their exclusion, we will not exclude employees from a unit upon racial considerations. No such differentiation was established in the instant case." *Matter of Tampa Florida Brewery, Inc.*, 42 N. L. R. B. 642, 645-646; *Matter of Aetna Iron & Steel Co.*, 35 N. L. R. B. 136, 138; *Matter of Southern Brewing Co., Inc.*, 42 N. L. R. B. 642, 645-646. The Board has followed this policy throughout its history. *Matter of American Tobacco Co., Inc.* (Reidsville, N. C.), 2 N. L. R. B. 198; *Matter of American Tobacco Co., Inc.* (Richmond, Va.), 9 N. L. R. B. 579; *Matter of Union Envelope Company*, 10 N. L. R. B. 1147; *Matter of Floyd A. Fridell*, 11 N. L. R. B. 249; *Matter of Interstate Granite Corp.*, 11 N. L. R. B. 1046. The Board has applied the same rule to requests for units based on sex distinctions. *Matter of General Electric Co.*, 43 N. L. R. B. 453; *Matter of Swift & Co.*, 11 N. L. R. B. 950, 955; *Matter of McCall Corp.*, 8 N. L. R. B. 1087; *Matter of California Walnut Growers Ass'n*, 18 N. L. R. B. 493. The New York State Labor Relations Board has refused to establish a unit limited to Oriental employees. *In re World Chinese American Restaurant*, No. SE-6403, 8 L. R. R. 800.

[22] Unfair labor practice cases before the National Labor Relations Board reveal numerous instances in which a union hitherto hostile to Negroes, has opened its doors, even in the South. In many of these cases the facts strongly indicate that the white workers had come to realize they could only secure effective bargaining if they enlisted their colored fellow workers in the union. See *Matter of Ozan Lumber Co.*, 42 N. L. R. B. 1073; *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585-586; *Matter of Southern Cotton Oil Co.*, 26 N. L. R. B. 177, 180, 182, 183; *Matter of Memphis Furniture Mfg. Co.*, 3 N. L. R. B. 26, 31; *Matter of Tex-O-Kan Flour Mills Co.*, 26 N. L. R. B. 765, 787-790, 791; *Matter of Bradley Lumber Co.*, 34 N. L. R. B. 610. Nor is it always the white workers who organize the Negroes. There are instances of the reverse situation. *Matter of Rapid Roller Co.*, 33 N. L. R. B. 557, 566-567, 570, enforced 126 F. (2d) 452 (C. C. A. 7), certiorari denied, 317 U. S. 650. And colored workers have taken the lead in organizing their white fellow workers even in the South. *Matter of Scripto Mfg. Co.*, 36 N. L. R. B. 411, 414. For other Board cases showing the Negro being accepted by his fellow white workers as an active union participant see *Matter of Sewell Hats, Inc.*, 54 N. L. R. B. 278, enforced 143 F. (2d) 450 (C. C. A. 5), certiorari pending No. —, this Term; *Mat-*

(Footnote continued on page 15)

which have always admitted Negro employees on a basis of equality. Forty international unions, twenty six affiliated

(Footnote continued from page 14)

ter of Western Cartridge Company, 43 N. L. R. B. 179, 196-200, enforced 138 F. (2d) 551, certiorari denied 64 S. Ct. 780, 972; *Matter of Brown Paper Mill Co.*, 36 N. L. R. B. 1220, 1227, 1229, 1233, enforced 133 F. (2d) 988 (C. C. A. 5); *Matter of Planters Mfg. Co.*, 10 N. L. R. B. 735, enforced 105 F. (2d) 750 (C. C. A. 4); *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 470.

[23] The reference following the name of each union is to the page of Peterson, Florence, Handbook of Trade Unions, American Council on Public Affairs (1944), where the membership provisions of the union's international constitution are set forth: International Federation of Architects, Engineers, Chemists, and Technicians, p. 27; United Automobile, Aircraft, and Agricultural Implement Workers of America, p. 33; Barbers and Beauty Culturists Union of America, p. 40; United Cannery, Agricultural Packing, and Allied Workers of America, p. 76; United Electrical Radio and Machine Workers of America, p. 105; United Farm Equipment and Metal Workers of America, p. 121; International Fur and Leather Workers Union, p. 134; United Furniture Workers of America, p. 136; United Gas, Coke, and Chemical Workers of America, p. 143; Federation of Glass, Ceramic and Silica Sand Workers of America, p. 145; Inland-boatmen's Union of the Pacific, p. 174; International Longshortmen's and Warehousemen's Union, p. 202; National Maritime Union of America, p. 228; International Union of Mine, Mill, and Smelter Workers, p. 245; American Newspaper Guild, p. 256; United Office and Professional Workers of America, p. 260; United Packinghouse Workers of America, p. 264; United Retail, Wholesale, and Department Store Employees of America, p. 330; United Shoe Workers of America, p. 344; State, County, and Municipal Workers of America, p. 352; United Steel Workers of America, p. 356; United Stone and Allied Products Workers of America, p. 361; United Transport Service Employees of America, p. 389; Transport Workers Union of America, p. 392; Utility Workers Organizing Committee, p. 401; International Woodworkers of America, p. 411.

[24] United Cement, Lime, and Gypsum Workers International Union, p. 81; Cigar Makers International Union of America, p. 84; United Hatters, Cap, and Millinery Workers International Union, p. 161; Hotel and Restaurant Employees International Alliance and Bartenders International League, p. 170; International Union of Wood, Wire, and Metal Lathers, p. 181; Progressive Mine Workers, p. 246; American Federation of State, County, and Municipal Employees, p. 354; Brotherhood of Sleeping Car Porters, p. 347; American Federation of Teachers, p. 372; United Wallpaper Craftsmen, and Workers of North America, p. 402.

with the Congress of Industrial Organizations,[23] ten with the American Federation of Labor[24] and four independent[25] have provisions in their international constitutions expressly providing that all workers within the jurisdiction of the union are eligible to membership therein regardless of race or color.

In the railroad industry the refusal of the National Mediation Board to break up units into racial groups has afforded the Negro worker no protection. There are several reasons for this. Railway unions were established before there was any requirement that they be designated by a majority of the class. The National Government has placed representatives of these unions upon adjustment boards with power to deny Negroes even the right to have their grievances heard by the carriers. In brief, the unions most hostile to Negroes have received the greatest statutory powers thus making the plight of the Negro railway worker worse than the plight of Negro employees in any other large industry.[26] The Negro firemen who until quite recently constituted a majority of the craft or class on many of the railroads in the South are fast being driven from the industry. This is being accomplished through the use of powers which both the carriers and the Brotherhood assume the Railway Labor Act vests in the Brotherhood as the representative of their craft or class. We believe the Railway Labor Act does not vest such powers in the Brotherhood. But, if it should be construed as vesting such powers then it would clearly violate the Fifth Amendment.

---

[25] International Airline Mechanics Association, p. 19; Foremen's Association of America, p. 132; United Mine Workers of America, p. 248; United Aircraft Welders of America, p. 405.

[26] Northrup, Herbert R., *Organized Labor and the Negro*, Harper's (1944), p. 48.

I

A labor organization which refuses, on account of race, to admit employees within a craft or class to membership in the organization cannot be the representative of that craft or class within the meaning of Section 2, Fourth, of the Railway Labor Act

A

Collective bargaining is a system whereby all employees whose terms of employment are being fixed participate within the union in determining the terms of their employment

The Railway Labor Act provides (Sec. 2, Fourth):

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of the Act. • • •

As this Court pointed out in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346, "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." The Court then concluded that since the practices and philosophy of the trade union movement considered it essential that the union have the power to fix the terms of employment of all employees within the unit to the exclusion of the negotiation of separate terms by any individual employee, Congress intended the representative

chosen by the majority to have such power. See also *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 and *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678. The Court did not have occasion in those cases to consider what protections for minorities, if any, Congress intended to provide when it placed such powers in the hands of the representative chosen by the majority. Exponents of the trade union viewpoint have always justified the displacement of the right to bargain individually with the right of collective bargaining by arguing that the individual employee is so impotent in bargaining with his employer that instead of losing his freedom of contract, he, for the first time, gains freedom of contract when the employer must deal with a union through which the employee may make his wishes effective.[27] Every exponent of collective bargaining whom we have been able to discover has defined collective bargaining as bargaining by an organization to which each worker affected may belong as long as he obeys all its reasonable rules. This rationale of collective bargaining was explained to Congress by its proponents when the bills which became the 1934 Amend-

[27] "The case for or against collective bargaining turns upon the issue of competition and personal freedom. * * * Its opponents argue that it deprives the laborer of his individual liberty to dispose of his services upon such terms as he pleases; it is retorted that his individual freedom is an impotent abstraction and that he must endure the authority of a union, in whose control he has a voice, or else submit to the dictation of a business corporation." Hamilton, Walton H., *Collective Bargaining* in Encyclopedia of the Social Sciences, vol. III, p. 630. See also Reports of U. S. Industrial Commission, vol. 17, 57th Cong., 1st Sess., H. R. Doc. No. 186 Washington (1901), p. LXXVI; Webb, Sidney and Beatrice, *Industrial Democracy*, London (1920 ed.), pp. 217-218, 840-842; Mitchell, John, *Organized Labor*, Philadelphia (1903), pp. 3-4, 75; Yoder, Dale, *Labor Economics and Labor Problems*, New York (1933), p. 438; Daugherty, Carroll R., *Labor Problems in American Industry*, New York (1933), p. 415; Taylor, Albion G., *Labor Problems and Labor Law*, New York (1938), pp. 86-87.

ments to the Railway Labor Act of 1926 and the National Labor Relations Act were pending.[28] Thus the following colloquy took place between two Senators, both of whom were active proponents of both bills:[29]

> Senator Wagner. * * * I think it has been recognized that, due to our industrial growth, it is simply absurd to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employer's terms, faces ruin for his family. The so-called freedom of contract does not exist under such circumstances.
>
> The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining. When 10,000 come together and collectively bargain with the employer, then there is equality of bargaining power.
>
> . . . . . .

---

[28] S. 2926, 73rd Cong., 2nd Sess., which was the forerunner of S. 1958, 74th Cong., 1st Sess., which became the National Labor Relations Act, was pending before the Senate contemporaneously with S. 3266, 73rd Cong., 2nd Sess., which became the 1934 Amendments to the Railway Labor Act. The Senate Report on S. 2926 (S. Rep. No. 1184, 73rd Cong., 2nd Sess.) was submitted on May 26, 1934, while the Senate Report on S. 3266 (S. Rep. No. 1065, 73rd Cong., 2nd Sess.) was submitted on May 21, and the House Report (H. Rep. 1944, 73rd Cong., 2nd Sess.) on the comparison bill in the House was submitted on June 11, 1934. Because of the contemporaneous consideration of the two measures by Congress as well as because Congress has stated in its reports that the collective bargaining features of the two bills were in substance the same (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22), this Court has treated the two Acts as having the same meaning. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45, which followed *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 and *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342 which followed *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.

[29] Hearings before the Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926 (March 14, 1934), p. 17.

> Senator LaFollette. This is an application, is it not, of the same general principle which was involved in the Railway Labor Act, to the entire industrial field.
>
> Senator Wagner. Exactly.

Similarly, Professor Robert L. Hale of the Law School at Columbia University testified:[30]

> If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally in the case of a steel plant, he becomes an employee of a steel company, and then he has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.
>
> Now, of course, any system of organization is liable to have faults at times. A union itself may possibly have faults, and sometimes it has been oppressive of its members, but it is in any event a choice between evils. Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what those rules are than if he is governed solely by the rules laid down by his employer.

The Senate Committee Report on the bill which became the National Labor Relations Act in listing the protections for minorities afforded by the bill stated:[31]

---

[30] Hearings before the Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926, p. 216. To the same effect see the testimony of Dr. Francis J. Haas at p. 116.

[31] S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14.

> An organization which is not constructed to practice genuine collective bargaining cannot be the representative of all employees under this bill.

We do not believe an organization can be said to be "constructed to practice genuine collective bargaining" when it is organized merely to further the aims of one of the racial groups within the unit, as is the Brotherhood in this case. On several occasions courts and administrative agencies have considered the question of whether a union which excluded employees within the unit from membership could serve as a statutory representative. The first consideration of that problem occurred in *Matter of Houde Engineering Corp.*, 1 N. L. R. B. (old) 35, 43-44 (August 30, 1934), which was decided by the National Labor Relations Board established under Public Resolution No. 44, 73rd Cong., H. J. Res. 375. In stating the general proposition that an employer had a duty to recognize the power of a union, chosen by a majority of the employees in an appropriate unit, to bind all employees in the unit, these three experts in the field of collective bargaining stated certain limitations on that proposition:

> Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining * * *, or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.

The next consideration of this question was by the Court of Appeals for the District of Columbia in *Brotherhood of Railway Clerks* v. *United Transport Service Employees*, 137 F. (2d) 817, 821-822, reversal on jurisdictional grounds, 320 U. S. 715. The Court of Appeals there set aside a

certification by the National Mediation Board of a union which excluded Negro employees. Chief Justice GRONER, concurring, stated (137 F. (2d), at 821-822)

> * * * the Brotherhood, designated by the Board as the bargaining agent of the [Negro] porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. * * * that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. * * * nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association. * * * to perpetuate it by law would be to impose a tyranny in many respects analogous to "taxation without representation." And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor. In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws.

The National Labor Relations Board has on two occasions expressed a doubt that a union which denied membership on racial grounds to employees within the unit, could act as the statutory bargaining representative for that unit. In *Matter of U. S. Bedding Company*, 52 N. L. R. B. 382, the Board stated:

> The circumstance that the membership of the C. I. O. is exclusively colored is equally irrelevant. The record refutes any claim that the C. I. O. discriminates against white employees in membership or otherwise. The constitution of the C. I. O. International prohibits racial discrimination, and the record does not show that any white employee has been refused membership. There is no warrant, therefore, for assuming that the C. I. O. discriminates against white persons, and consequently no occasion for passing upon the question whether a union which denies membership to employees on the basis of race may nevertheless represent a unit composed in part of members of the excluded race. We find that the industrial unit is appropriate.

In *Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016, the Board said

> We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race.

The rationale of collective bargaining compels the conclusion that a union which denies membership to Negro employees in the craft cannot act as the representative of a unit composed in part of the excluded employees. Where the justification for denying individuals and minorty groups the right to contract on their own behalf fails, the rule that the union chosen by the majority binds the minority is clearly

inapplicable. This is true in every instance where members of the craft are excluded from membership in the organization which conducts the bargaining.

Experts in the field of labor relations recognize that "the only way the minority workers can express their vews and exert their influence is through union membership." [32] It seems clear that the denial of the opportunity to a particular group within the craft or class to participate in the decisions and functioning of the majority representative creates irresponsibility destructive of the industrial peace which the Act was framed to safeguard. The establishment of working conditions and the administration of collective agreements was left in the Act "to those voluntary processes whose use Congress had long encouraged to protect those arteries of interstate commerce from industrial strife". *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railroad*, 320 U. S. 323, 337.[33] It was thus the judgment of Congress that uncompelled adjustment of differences between representatives of the railroads and the employees would promote mature and stable relations be-

[32] Golden, Clinton S. and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy*, Harpers (1942), pp. 211, 214: "It is * * * a fact of industrial democracy, written into the law, that it is a one-party system of democracy. In this respect it differs from our traditional two-party system of political democracy. * * * To have a voice in making the decisions of the majority the minority or non-union workers have to join the union." "* * * industrial democracy functions through a one-party system. All workers are represented by one union and they are not citizens of industry until they belong to it."

[33] See also Chief Justice HUGHES' comment on the 1926 Railway Labor Act in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 569: "All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representative, to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained."

tween them. Voluntary participation in the adjustment of disputes was viewed by Congress as indispensable to a responsible adherence by labor organizations to the commitments made in the mediation and arbitration process. But the voluntarism which is crucial in the statutory scheme would be set at naught if groups within the unit were compelled to accept the decisions of the majority without the opportunity for participation in their formulation. Such compulsion creates an atmosphere favorable to industrial strife.

It is impossible for the Brotherhood to represent the Negro firemen fairly and impartially so long as they are barred from membership. Its action cannot be representative until the Negro fireman can go to meetings, know what problems the white firemen are discussing, let the white firemen hear his views and his problems, participate in framing the bargaining policy and proposals and in the nomination and election of union officers, bargaining and grievance committees.

In the instant case the Brotherhood has been trying to drive the Negro firemen off of the railroads. But even in instances where a union has no intention to seek a collective bargaining agreement which discriminates against a racial minority, the effect of excluding employees of a minority race from membership in the union will invariably result in the terms of the agreement being more favorable to the majority than to the minority. There are innumerable provisions in any collective bargaining agreement which affect employees in different ways. For instance, the kind of a seniority system, whether it is departmental or plant wide, affects one group differently from another. When all the employees to be affected can be heard in open meeting as to the advantages of one system over another and vote on the system for which the union will press in its bargaining negotiations, the will of the majority should govern. But

where a racial group is excluded from membership, although they together with a minority of the group in the union might favor a different seniority system from that favored by a majority of the union, the system favored by the majority of the union will prevail, although the majority of the union may actually be a minority of the craft or class.

From the Declaration of Independence to date, the principle that the only legitimate government is one in which the governed participate, has been one of the most basic tenets of our political philosophy. The framers of the Declaration of Independence denounced as impossible the notion that they could be represented in Parliament by someone whom they did not elect. In the sphere of the government of conditions of employment no less than in any other area of government, it is impossible for a group of employees of one race to in fact be represented by an organization composed solely of employees of another race. And the sponsors of the Railway Labor Act recognized that "the labor union is really a form of government".[34]

[34] Statement of Coordinator of Transportation Eastman, Hearings before the Senate Committee on Interstate Commerce, 73rd Cong., 2nd Sess., on S. 3266, p. 146. See also his statement before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., on H. R. 7650, pp. 33-34.

B

The Railway Act violates the Fifth Amendment if it empowers a union composed solely of members of one race to act as statutory bargaining representative for the craft including members of another race whom it excludes from membership

The power to fix wages, hours of work and other conditions of employment binding on employees who neither consent to the terms established nor participate in their determination is governmental in character. As we have shown (pp. 20-21, *supra*) sponsors of the Railway Labor Act in Congress spoke of the governmental character of the trade unions' functions. Trade unions for years have taken the same position.[37] This Court has held that the delegation to a majority of coal miners and the producers of a majority of the tonnage of coal, in specified areas, of the power to fix maximum hours and minimum wages binding on all miners and all producers in the area, was a delegation of a "governmental function." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311.

---

[37] Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896-1932, MacMillan (1935), p. 10. "The trade agreement * * * is a written constitution of a new type of government, an *industrial government*, established by bargaining as an organized group. * * * the industrial government envisaged by unionism was a highly integrated government of unionized workers and of associated employer managers, jointly conducting the government with 'laws' mandatory upon the individual employer and employee." Cr. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 638 (C. C. A. 4).

The powers which the Railway Labor Act confers on the representative selected by a majority of the craft or class, have several additional aspects which render them governmental in character, over and above the fact of fixing terms of employment binding on all employees in the craft or class. The representative is granted power to bind all the employees not only in negotiation of the terms of employment but in their interpretation and application as well. It is clothed not only with "legislative" powers to fix rules but with the "judicial" power to determine as a member of a governmental agency, the National Railroad Adjustment Board, how the rules which it established shall be interpreted and applied. It is also clothed with the power to supersede the National Railroad Adjustment Board completely and to create in such manner as it and the employer shall agree, substitute machinery for interpreting and applying the rules it makes.[38] And this Court has held that employees are thereby excluded from resort to the courts for a determination of their rights under collective agreements.[39]

The representative thus is constituted not only the legislative branch of the government controlling his industrial

[38] Section 3, First, of the Railway Labor Act provides for the creation of a National Railroad Adjustment Board, in which half of the members shall be selected by labor organizations. Section 3, Second, provide "nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." It has been held that every employee in the craft or class is bound by the system established in such a collective agreement, and cannot prosecute his grievance in any manner other than that specified. *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. (2d) 39 (C. C. A. 4).

[39] *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338.

life, but the judicial and probably the executive, as well. And this whole little sub-government is removed from the controls of political government through this Court's holding that its acts are not subject to review in the judicial system of the nation.

The Railway Labor Act is an instance of the growing tendency within our political institutions of conferring self-regulatory power upon the groups to be regulated.[40] Congress adopted this method not only because of the practical difficulties in vesting in government officials the task of regulating such complicated and diverse problems,[41] but also because it believed that employees and employers would be more likely to abide by the rules and regulations if the parties themselves established those rules and regulations. If the group to which such self-regulatory powers are delegated, is composed of all the persons to be regulated and organized in such a manner as to afford all its members a democratic participation in their self government, the group would seem to be a proper one to which to make the delegation. It would still have to exercise its powers subject to the restraints that bind Congress (see pp. 33-35, *infra*). But as a depository of such delegated power, a group so organized, with its regulatory powers limited to those who had the opportunity to join the group so long as they obeyed its reasonable rules, would appear to be proper. We be-

---

[40] Notes: Delegation of Power to Private Parties, 37 Col. L. Rev. 447 (March 1937); Delegation of Governmental Power to Private Groups, 32 Col. L. Rev. 80 (January, 1932).

[41] See the testimony of Dr. Francis Haas during hearings on the Wagner Bill where he said: "The outstanding defect of government as an instrument of social justice is that it cannot get enough money appropriated to police and enforce labor standards. Other defects are present, but this it seems is the principal one. The alternative is genuine collective bargaining." Hearings before the Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2nd Sess., p. 116.

lieve Congress intended that only such a group should act as statutory representative under the Railway Labor Act.

The Brotherhood is not such a group. It is an organization composed of only a portion of the employees in the craft or class. It refuses by reason of their race to admit petitioners and other Negro firemen. Nevertheless it claims and has attempted to exercise the power to govern employment terms for the Negro firemen. If the Act be construed to permit the Brotherhood to qualify as a statutory representative, it allows a white majority vast powers over a Negro minority which has no representation in fact. So construed it is unconstitutional. In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 310-311, the Court in holding the delegation of power to the majority there involved, violative of the Fifth Amendment said:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such

> power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122.

A construction of the Railway Labor Act which would permit the Brotherhood to act as the representative of the craft or class has a vice not present in the *Carter* case, in that it would violate our constitutional policy against discrimination on account of race. *Smith* v. *Allwright*, 321 U. S. 649, 664-665. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 94; *Gibson* v. *Mississippi*, 161 U. S. 565, 591. So long as petitioners because of race are barred from membership in the Brotherhood and participation in its affairs equally with other members of the craft or class, they are deprived by reason of race of the right to share in the government of the craft or class. Just as admission to membership in the Democratic Party in Texas is a condition to participation in political government, admission to the Brotherhood is a condition to participation in industrial government of the craft or class of firemen.

II

A collective bargaining agreement which by its terms requires a carrier to discriminate against employees within the craft or class because of race in apportioning work is illegal under the Railway Labor Act

If, as we have argued above, the Brotherhood is not qualified to act as the statutory representative of the craft

or class of firemen, its collective bargaining agreement is invalid. Under the Railway Labor Act a carrier can bargain collectively with a union for the craft or class only if the union is entitled to act as the statutory representative of the craft or class. The Railway Labor Act imposes on the carrier "the affirmative duty to treat only with the true representative" and "the negative duty to treat with no other." *Virginian Ry. v. System Federation*, 300 U. S. 515, 548.

Respondent railroads have violated the Railway Labor Act, not only by recognizing the Brotherhood when that organization was not the lawful representative of the railroads' employees, but also by entering into agreements with the Brotherhood which are, in effect, closed-shop contracts. Section 2, Fifth, of the Railway Labor Act forbids the execution of closed-shop contracts on the railroads. Yet the employment preference granted in the collective agreements here involved, although phrased in terms of race, in fact operates to favor Brotherhood members over nonmembers; no Negro firemen and all white firemen are members of the Brotherhood (No. 37, R. 6; No. 45, R. 83, 86). Thus by gradually forcing the Negroes off the roads, the agreements will achieve the same end as the statute forbids, a monopoly of jobs in the hands of the Brotherhood members.

Moreover, aside from the ultimate effect of the contracts, they have an immediate effect which the statute outlaws. Section 2, Fifth bans not only absolute closed-shop contracts but also bans contracts which achieve any preferential treatment of Brotherhood members. It was expressly noted, when the 1934 Amendments to the Railway Labor Act, containing the present ban on closed-shop contracts, was pending in Congress, that those provisions would make illegal certain then existing contracts between one of the national

railroad unions and some of the carriers which required that at least a specified percentage of the employees in certain classes be members of the union.[42]

If the Court should determine that the Railway Labor Act permits a representative and a carrier to make and put into effect a collective agreement which drives from their jobs a racial minority, it is to that extent violative of the Fifth Amendment. Racial discrimination is by its very nature forbidden to those who exercise government powers, which in a democracy are subject to the "mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon*, 286 U. S. 73, 88-89.

These constitutional guarantees may not be nullified "through casting * * * (a regulatory) process in a form which permits organizations to practice racial discrimination * * * ". *Smith* v. *Allwright*, 321 U. S. 649, 664. Here the Brotherhood is exercising, and insisting upon exercising, the right granted by the Railway Act to act as the exclusive representative of the entire craft of firemen. "Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken 'under color of' State law." *United States* v. *Classic*, 313 U. S. 299, 326. It is unnecessary to decide to what extent this transforms the Brotherhood into a governmental agency. "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of

[42] H. Rep. No. 1944, 73rd Cong., 2nd Sess., pp. 14-16; S. Rep. No. 1065, 73rd Cong., 2nd Sess., Part 2, p. 2; Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., pp. 156-157; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 28-30, 94-105.

official power * * *. The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their actions." *Nixon* v. *Condon*, 286 U. S. 73, 88-89.

Unless this argument is valid, the Federal Government may confer powers on unions which they may exercise in a manner forbidden to the Government itself; powers to suppress a racial minority and deny it "the right to work for a living in the common occupations of the community."[43] If the Railway Labor Act provides such a ready means of evading our constitutional guarantees, it is invalid. It does not so provide, however. It does not permit bargaining representatives "to fix hours and wages without standards or limitations" and "according to their own views of expediency" (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 318). Rather it requires that they adhere to "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346) by entering into agreements "which reflect the strength and bargaining power and serve the welfare of the group" (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 338).

So construed, the Act confers no powers the exercise of which cannot be kept within reasonable bounds. If it is construed otherwise, it cannot be sustained.

---

[43] *Truax* v. *Raich*, 239 U. S. 33, 41. As pointed out in that case (239 U. S. at p. 43), it is manifestly no defense that the exclusion from opportunity to work is not complete or that the discrimination takes the form of a quota system.

> For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[44]

The Court should reach the same result were it to view the collective labor agreements as mere contracts between private parties instead of as an exercise of delegated legislative powers to govern conditions of employment. As one Federal court, very aptly, said:[45]

> It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. * * * Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear. * * * Such a contract is absolutely void and should not be enforced in any court * * *.

Since no court could constitutionally give any legal effect to the discriminatory provisions of the collective agreements here involved, the Court should declare their invalidity and enjoin the parties thereto from giving them further application.

---

[44] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

[45] *Gandolfo* v. *Hartman*, 49 Fed. 181, 182-183.

Conclusion

Legislative ingenuity, inspired by the exigencies of our increasingly complex society, continues to devise new instrumentalities for the exercise of governmental functions. Judicial regulation must keep pace with such legislative innovations. Otherwise, tyranny can and will reassert itself in new guise. Such a new mode of oppression is here exposed to judicial scrutiny. Its incompatibility with our fundamental law is revealed. It is submitted that the judgments herein appealed from should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,
WILLIAM H. HASTIE,
Counsel for National Association for the Advancement of Colored People.